



In the Matter of:

MILLWRIGHT LOCAL 1755

ARB CASE NO. 98-015

In re: Winfield, WV Lock and
Dam Project, Army Corps of Engineers
Contract No. DACW69-94-0027

DATE: May 11, 2000

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:

Carl E. Hostler, Esq., *Hostler & Donnelly, L.C., Charleston, West Virginia*
Charles F. Donnelly, Esq., *Donnelly, Carbone & Kettler, P.L.L.C., Charleston, West Virginia*

For the Respondent:

Marva M. Peace-Jackson, Esq.; Douglas J. Davidson, Esq.; Steven J. Mandel, Esq.;
U.S. Department of Labor, Washington, D.C.

For the Intervenor:

Terry R. Yellig, Esq., *Sherman, Dunn, Cohen, Leifer & Yellig, P.C., Washington, D.C.*

DECISION AND ORDER OF REMAND

Millwright Local Union 1755, United Brotherhood of Carpenters and Joiners of America (the Local), petitions for review of administrative action by the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, under the Davis-Bacon Act, as amended, 40 U.S.C. §§276a-276a-7 (1994). The Administrator's designee denied the Local's request to modify a February 1997 decision in which the Wage and Hour Division (Division) added a conformed "millwright" classification and wage rate of \$24.11/hr. (wages and fringe benefits) to the "heavy" wage determination applied to the construction of a lock-and-dam project at Winfield, West Virginia.

Earlier, in 1994, the Division had omitted the millwright classification from the original wage determination when it was published, even though the Division had received notice of the then-current collectively-bargained wage rate for millwrights of \$26.13/hr. When adding the millwright classification through the conformance process, the Administrator selected a wage rate identical to the rate for the carpenter classification (\$24.11/hr.) already included in the wage determination, rather than a rate closer to the negotiated millwright rate.

As we discuss below, the Administrator’s decision is affirmed in part, specifically the Administrator’s determination that the disputed wage determination would not be modified retroactively. However, because the Administrator did not address adequately the Local’s request for reconsideration of the conformance action, this matter must be remanded to the Administrator for a supplemental decision.

BACKGROUND

A. Regulatory Framework

The Davis-Bacon Act requires that the advertised specifications for construction contracts to which the United States is a party must contain a provision stating the minimum wages to be paid the various classifications of mechanics or laborers to be employed under the contract, based on wage rates determined by the Secretary of Labor to be prevailing in the geographic locality where the contract is performed. 40 U.S.C. §276a. The function of issuing minimum wage determinations is delegated under the implementing regulations to the Administrator of the Wage and Hour Division. 29 C.F.R. §1.1(a) (1999). The minimum wage rates contained in the determinations derive from rates prevailing in the locality where the work is to be performed or from rates applicable under collective bargaining agreements. 29 C.F.R. §1.3. Wage determinations are incorporated into bid solicitations by contracting agencies. *See* 29 C.F.R. §5.5(a); *see also* 48 C.F.R. §36.213-3(c) (1999).

There are two different ways that contracting agencies obtain wage determinations for their construction projects. When wage patterns for a particular type of construction in a locality are established and when a large volume of procurement is anticipated in the area for the construction, the Administrator may furnish notice in the Federal Register of a “general” wage determination. 29 C.F.R. §1.5(b). General wage determinations are published in a special Government Printing Office document. Contracting agencies may use general wage determinations without notifying the Administrator. *Id.* Alternatively, contracting agencies may ask the Wage and Hour Division to issue a wage determination for particular contracts to cover specified employment classifications on an individual construction project. 29 C.F.R. §1.5(a). These issuances are designated “project” wage determinations. The instant case involves one of the Division’s general wage determinations.

Bidders who believe that a wage determination is erroneous may request reconsideration by the Administrator under procedures established in the 29 C.F.R. Part 1 Davis-Bacon regulations. 29 C.F.R. §1.8. Actions modifying a general wage determination normally are “effective with respect to any project to which the determination applies, if notice of [the action] is published before contract award (or the start of construction where there is no contract award)” except that “a modification to an applicable general wage determination, notice of which is published *after* contract award (or after the beginning of construction where there is no contract award) *shall not* be effective.” 29 C.F.R. §1.6(c)(3)(vi) (emphasis added). *See* 29 C.F.R. §1.6(c)(2)(A) (in instances of competitive bidding, modifications received less than 10 days before the opening of bids shall be effective unless insufficient time remains to notify bidders of the modification).

On occasion, contract performance may require the addition of trade classifications after the period permitted for modification of the wage determination through the normal review process. Job classifications are added to a wage determination after a construction contract has been awarded through a “conformance action,” under procedures found in the 29 C.F.R. Part 5 regulations. The regulations provide that the contracting agency (through its contracting officer) “shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination.” 29 C.F.R. §5.5(a)(1)(v)(A) (1999). The wage rates paid to any employment classification being added must bear a “reasonable relationship to the wage rates contained in the wage determination.” 29 C.F.R. §5.5(a)(1)(v)(A)(3).

A conformance action is effected in one of two ways, depending upon whether the contractor, the employees being added to the wage determination and the contracting officer agree or disagree as to the classification and wage rate. If the contractor, the employees (or their representatives) and the contracting officer agree on the additional classification and wage rate, the contracting officer submits a report of the action taken to the Administrator who then will approve, modify or disapprove the conformance. 29 C.F.R. §5.5(a)(1)(v)(B). In the event that the principals disagree, “the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination.” 29 C.F.R. §5.5(a)(1)(v)(C). Any party who disagrees with the Administrator’s determination may appeal the decision to this Board. 29 C.F.R. §7.1 (1999).

B. Facts

The U.S. Army Corps of Engineers (contracting agency) contracted with Al Johnson Construction Company (Al Johnson or contractor) to build a lock-and-dam project in Winfield, West Virginia. AR Tab P.^{1/} Construction of the project required the use of millwrights. “Millwright” is a specialty trade that installs and maintains large pieces of machinery which require precision alignment, *e.g.*, generators in power plants and conveyor systems in automobile assembly plants. Millwrights working on lock-and-dam projects install “[b]earings, gears, drives, hoists, seals, motor alignment [for example] on culvert valves, emergency gates, miter gates and trash racks.” Unmarked exhibit submitted November 4, 1998.^{2/} In contrast, carpenters working on lock-and-dam projects build wood and metal forms and scaffolding. *Id.*

^{1/} The abbreviation AR refers to documents contained in the Administrative Record and identified by AR tab.

^{2/} This exhibit is captioned “A Pictural Comparison of the Millwright Trade to the Carpenter Trade in Regards to Work Performed on Locks.” It was submitted to the Board well after the Administrator issued her December 23, 1997 decision letter and was not part of those deliberations. We conclude that the exhibit, which is demonstrative in nature, did not require consideration by the Administrator. *COBRO Corp.*, ARB Case No. 97-104, July 30, 1999, *corrected*, Sept. 13, 1999, slip op. at 12 n.10.

Although unionized millwrights are members of the United Brotherhood of Carpenters and Joiners, they typically are organized into separate, small millwright local unions and do not perform carpentry work. Millwrights generally are regarded as more skilled than carpenters.

When the Division issued the Davis-Bacon Act wage determination used for the lock-and-dam project (WD WV930003, Mod.10 (1/14/94)), it failed to include the classification of millwright. *See* AR Tab F. Omission of the classification and wage rate evidently was an oversight. Earlier “heavy” wage determinations for this geographic area had incorporated the millwright classification and rate, and the Division possessed information in its files when the wage determination was issued documenting the then-current collectively-bargained millwright wage rates.^{3/} The State of West Virginia is unionized to a considerable degree, and the wage rates in the “heavy” wage determination were based on collectively-bargained rates. Neither the bidders nor the Local filed a timely request for reconsideration of the wage determination prior to the bid date on the project pursuant to 29 C.F.R. §1.8, seeking to incorporate the collectively-bargained wage rate for the millwright classification.

Al Johnson is signatory to a project agreement with various unions covering work on the Winfield lock-and-dam project. The agreement specifies the terms and conditions under which workers are employed. Millwrights’ Second Petition for Review, Exhibit (Exh.) 1.^{4/} Pursuant to the project agreement, the unions agreed that “wage rates as provided in the specifications to this project shall remain in full force and effect through the completion of the project.” Heavy and Highway Construction Project Agreement (Revised Oct. 1994), Addendum. As noted above, the wage determination applicable to the project (WD WV930003 Mod. 10) did not include a millwright classification and wage rate. AR Tab F.

^{3/} On at least four occasions, including in January 1992, February 1993 and December 1993, the Division received notification that millwrights were subject to an elevated collectively-bargained wage rate. AR Tabs K, L, M. In December 1993, the Division was notified that the local negotiated rate for millwrights increased to \$26.13/hr. (wage and fringe benefits) effective June 1993. AR Tab A at 3; Tab H.

^{4/} The project agreement is not found in the Administrative Record in this case. In reviewing final decisions of the Administrator in Davis-Bacon Act cases, the Administrative Review Board is charged with providing appellate review of the Administrator’s decisions “on the basis of the entire record before it.” 29 C.F.R. §§7.1(e), 7.9(f). Our primary focus is on the record developed before the Administrator which informed the Administrator’s deliberations. To the extent that we review extra-record materials that accompany a petition for review or other pleadings – *i.e.*, materials that were not submitted to the Administrator previously – our limited concern is to decide whether the materials raise questions that warrant a remand to the Administrator for additional evaluation. *See Dep’t of the Army*, ARB Case Nos. 98-120/121/122, Dec. 22, 1999, slip op. at 11, n.10 (under the Service Contract Act, 41 U.S.C. §§351-358 (1994)); *COBRO Corp.*, ARB Case No. 97-104, slip op. at 12, n.10 and cases cited therein (same); *see also* 29 C.F.R. §7.1(e).

After the contract was awarded and construction had begun, Al Johnson requested a conformance of the wage determination,^{5/} specifically asking that the millwright classification be added to the wage determination at a wage rate equivalent to that of the carpenter classification. Carpenters received an hourly rate of \$24.11 under the wage determination. The conformance request form did not include any indication that the employees' representative (*i.e.*, the Local) concurred in the request. The Division approved the \$24.11/hr. conformed wage rate requested by Al Johnson. AR Tab B.

The Local thereafter contacted the Division objecting to the conformed classification and wage rate, and asserting that its members were entitled to receive the collectively-bargained rate for millwrights of \$26.13/hr. as negotiated under the 1991-1993 "Heavy Agreement" between the Constructors' Labor Council of West Virginia and various labor organizations (including the West Virginia State Council of Carpenters and Millwright Local Union 1755). AR Tabs C, T. This labor agreement specifies that local union rates dictate millwright rates on any given project ("[t]he rates and working conditions for millwrights shall be those established by the local union having jurisdiction over millwrights in the area where work is to be performed"). AR Tab K.

In response to the Local's concerns, the Division invited the Local to request reconsideration. AR Tab T. The Local ultimately presented two arguments, in the alternative, urging that (a) the original wage determination should be modified retroactively to correct the Division's error and incorporate the Local's collectively-bargained rate, or (b) the January 9, 1997 conformance decision (*i.e.*, the \$24.11/hr. rate) should be reconsidered and the collectively-bargained rate (\$26.13/hr.) should be issued. *See* Millwrights' [First] Petition for Review at 6-7.

The Division issued a decision letter on December 23, 1997, denying the Local's request for retroactive modification of the wage determination under the 29 C.F.R. Part 1 regulations. AR Tab A. The Administrator conceded that "before the . . . bid opening date on this contract, documentation of increased [negotiated] wage and fringe benefit rates was apparently available." *Id.* at 3. While also conceding that the Division may have overlooked the reference to millwrights in the collective bargaining agreement then in the Division's possession, the Administrator rejoined that "no evidence was found to indicate that any interested party had brought this oversight to the attention of the Branch of Construction Wage Determinations prior to the bidding of the contract." *Id.* The Administrator concluded that retroactive incorporation of the millwright classification and collectively-bargained rate (\$26.13/hr.) was not appropriate under the regulations. Such a modification would be appropriate only if published prior to contract award. *Id.*

With regard to the request to reconsider the conformed wage rate that had been issued under the 29 C.F.R. Part 5 regulations, the Administrator simply iterated the conformance policy of the

^{5/} General decision No. WV930003 (Mod. 10) for heavy and highway construction projects, which omitted the millwright classification and rate, was published in January 1994. The instant contract bid opening occurred on February 8, 1994; the contract was awarded on May 27, 1994; and construction began in August 1994. Millwrights did not commence work on the project until April 1996. By then, the Local had become aware of the omission, and in June 1996 it complained to the contracting agency. Al Johnson requested conformance in August 1996.

Division and reviewed the prior conformance action of January 9. AR Tab A at 2. This appeal followed.

PROCEDURAL HISTORY AND OUTSTANDING MOTIONS

The Local requested that the Administrator modify the Division's initial determination by letter dated March 10, 1997, with supplementary materials filed in April 1997. On October 6, 1997, prior to the Administrator's December 23, 1997 final decision letter, the Local first petitioned this Board for review of the Division's initial determination. The Local filed a second petition for review in January 1998, appealing the final decision letter, with the first petition appended. The Administrator's pending motion to dismiss the first petition as premature is granted; we do not suggest, however, that the contents of the first petition in any manner are stricken from the second petition, which was timely filed.

The Building and Construction Trades Department, AFL-CIO, intervened in support of the Local. The Administrator opposed the Local's first and second petitions for review. The Local and the Intervenor (collectively "the Unions") jointly submitted a memorandum in reply to the Administrator's opposition. By motion dated May 1, 1998, the Administrator moved for leave to respond to the Unions' April 20, 1998 Memorandum in Reply to the Statement of the Acting Administrator in Opposition to the Petition. The Unions thereafter filed a memorandum in opposition. They asserted that the Administrator had mischaracterized and obscured their positions, and they proceeded in their memorandum to offer additional argument. The Administrator's motion for leave to file a response is granted, and the Unions' motion that the Administrator's response be "disregarded and deleted from the record" is denied. Both the Administrator's response and the Unions' memorandum in opposition are accepted for filing.

The contractor on the project, Al Johnson, limited its participation to written statements (*e.g.* AR Tabs P and R) filed with the contracting agency, which the agency forwarded to the Division for consideration in conjunction with the conformance request. The Local, Intervenor and Administrator participated in oral argument before the Board.

DISCUSSION

The Board's review of decisions issued by the Administrator is in the nature of an appellate proceeding. 29 C.F.R. §7.1(e). We assess the Administrator's rulings to determine whether they are consistent with the statute and regulations, and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Davis-Bacon Act. *Miami Elevator Co.*, ARB Case Nos. 98-086/97-145, Apr. 25, 2000, slip op. at 16, *citing Dep't of the Army*, ARB Case Nos. 98-120/121/122, Dec. 22, 1999 (under the parallel prevailing wage statute applicable to federal service procurements, the Service Contract Act, 41 U.S.C. §351-358 (1994)).

In this discussion, we first review briefly the conceptual differences between the process of adding job classifications and wage rates through the *conformance process* and requests for

reconsideration of the initial *wage determination*. Second, we review the Administrator's decision denying the Local's request for a retroactive modification of the wage determination on the lock-and-dam project. Third, we analyze the Administrator's response to the Local's request that he reconsider the \$24.11/hr. conformed wage rate, and the jurisdictional problem that it creates for the Board. Finally, we address the role of employees and unions in the conformance process, and the significance of collective bargaining agreements in developing conformed wage rates.

A. *Differences between Davis-Bacon conformance actions and the reconsideration of initial wage determinations*

As noted above, the Local's petition involves both a challenge to the "heavy" wage determination, and a challenge to the Administrator's conformance determination. The conformance process under 29 C.F.R. Part 5 is limited to adding an employment classification which was omitted from the applicable wage determination. 29 C.F.R. §5.5(a). It occurs *after* the contractors have submitted their bids and the contract has been awarded to the winning bidder and assumes "that the wage determination that was included in the bid specifications essentially is correct [with] the limited deficiency . . . that a needed job classification and wage rate are missing." *COBRO Corp.*, ARB Case No. 97-104, July 30, 1999, *corrected*, Sept. 13, 1999, slip op. at 10 (parallel Service Contract Act conformance).

The conformance process is designed to facilitate expedited addition of a missing classification and wage rate while simultaneously maintaining the integrity of the bidding process (discussed below). Additions are limited in the following manner: The work to be performed by the proposed classification may not be performed by any classification already listed in the wage determination, the proposed classification must be utilized in the area by the construction industry and the wage rate proposed for the classification must bear a reasonable relationship to the rates already included in the wage determination. 29 C.F.R. §5.5(a)(1)(v)(A). The Administrator accordingly determines which classifications already included in the wage determination are comparable in terms of skill to the missing classification and derives a wage rate for the missing classification reasonably related to the included rates. "In establishing a conformed rate, the Administrator is given broad discretion and his or her decisions will be reversed only if inconsistent with the regulations, or if they are 'unreasonable in some sense, or . . . exhibit[] an unexplained departure from past determinations . . .'" *Environmental Chemical Corp.*, ARB Case No. 96-113, Feb. 6, 1998, slip op. at 3 (*quoting Titan IV Mobile Service Tower*, WAB Case No. 98-14, May 10, 1991).

In marked contrast to conformance is the process for modification of wage determinations under 29 C.F.R. Part 1. Wage determinations reflecting minimum wage rates to be paid classifications of employees under a contract are incorporated into bid packages and eventually into the construction contract. "Thus all bidders for federal construction projects are provided with the same information concerning the minimum wage rates that must be paid on a federal construction procurement." *Pizzagalli Construction Co.*, ARB Case No. 98-090, May 28, 1999, slip op. at 5. Challenges to original wage determination rates must be made *prior* to contract award. This requirement is essential to an equitable procurement process, ensuring that "competing contractors

know in advance of bidding what rates must be paid so that they bid on an equal basis.” *Kapetan, Inc.*, WAB Case No. 87-33, Sept. 2, 1988.

Just as the Davis-Bacon [Act] prevailing wage requirements promote “the principle that all prospective federal construction contractors be on a ‘level playing field’ in the bidding process,” the process of including the applicable wage determination in the construction project bid package and contract insures that all bidders are developing their bid proposals with the same expectations regarding the prevailing wage and fringe benefit rates that will be paid on the project.

Pizzagalli Construction Co., ARB Case No. 98-090, slip op. at 5, quoting *AC and S, Inc.*, WAB Case No. 93-16, Mar. 31, 1994. The modification of a wage determination (occurring prior to contract award) thus differs from a conformance action (occurring after contract award) in terms of scope and precision. See *Clark Mechanical Contractors, Inc.*, WAB Case No. 95-03, Sept. 29, 1995, slip op. at 4 (the Administrator is not required to conduct a survey to establish the prevailing wage in conforming classifications; his responsibility rather is to establish a wage rate that reasonably relates to those contained in the wage determination).

B. Whether the Administrator’s wage determination should be modified retroactively because of the Division’s errors and omissions

The Division apprized the Local of the conformance only well *after* its issuance on January 9, 1997, despite knowledge by the Division that it had rendered the determination “[i]n the absence of an agreement by the interested parties . . .” AR Tab B. Specifically, by letter dated February 21, 1997, the Division District Director forwarded a copy of the conformance to counsel for the Local, in response to a “telephone conversation on February 19, 1997, regarding prevailing wage rates for Millwrights working on [the Winfield project].” AR Tab T. The District Director additionally advised the Local’s counsel that reconsideration of the conformance by the Division was available upon request. *Id.* By letter dated March 10, 1997, the Local requested reconsideration. That letter stated in relevant part:

For many months, we have been attempting to provide information regarding the wage classification for Millwrights at the [Winfield] job. Beyond our initial letter of complaint, we have found it very difficult to be included in the processing of this matter. Regardless of those difficulties, please understand that the wage rates for Millwrights at the job have been in error since its inception. Enclosed please find a summary of the contractual wage rates for Millwrights in the relevant area

Millwrights’ [First] Petition for Review, Exh. 5. The Local provided the Division with additional information substantiating the collectively-bargained rates in April 1997. *Id.*, Exh. 6. Finally, in early October 1997, the Local fully disclosed its initial position in its first petition for review which

it served on the Division section chief responsible for coordinating review of the conformance by the Administrator. *See* AR Tab T. In the petition, the Local requested (i) retroactive modification of the wage determination to incorporate the collectively-bargained wage rates or, in the alternative, (ii) modification of the conformance to adopt the bargained rates.

The Administrator explicitly declined to modify the wage determination in the December 23, 1997 decision letter. AR Tab A. The Administrator conceded that between 1991 and 1993 it had received documentation that an increased collectively-bargained wage rate may have applied for a millwright classification, concluding that “before the February 8, 1994 bid opening date on this contract, documentation of increased wage and fringe benefit rates was apparently available.” AR Tab A at 3. The Administrator noted, however, that the Division possessed no evidence that any interested party had requested modification of the wage determination to include the millwright classification and wage rate prior to contract award of the Winfield lock-and-dam project. *Id.* Modifications to general wage determinations that are made by the Administrator after contract award are not effective. 29 C.F.R. §1.6(c)(3)(vi). The Administrator stated:

[M]odifications to general wage determinations are applicable to a project only if published before the contract award, or start of construction where there is no contract award. According to information made available to us, in this case the contract was awarded on May 27, 1994. Accordingly, modifications to the wage determination published after May 27, 1994 are not applicable to the project and an appeal of the wage determination after that date is not timely.

AR Tab A at 3. The Administrator accordingly was not authorized under the Part 1 regulations to modify the wage determination at that juncture.

The Local, in its review petition, explained the lack of notification against the backdrop of a chronology and associated argument which may be summarized as follows:

- February 1994 marked the contract bid opening date, with the contract being awarded in May 1994. Construction on the project did not begin until August of that year. Millwrights commenced work more than a year and a half later in April 1996. The Local first filed a written objection with the contracting agency in May 1996, and followed with a complaint to the Division in January 1997, shortly after approval of the conformance proposal.
- The Division actively misled the Local. Upon first becoming aware of the omitted classification and wage rate in December 1994, the Local contacted an investigator for the Division who advised the Local against filing a complaint until millwrights actually commenced work on the project and suffered payment at an incorrect rate.
- The Local reasonably believed that its members were included on the project within a millwright classification because Al Johnson supplied them with indicia of employment, *e.g.*, orientation information, administrative policies, work rules, medical authorizations, health questionnaires; and they attended pre-job meetings

with management representatives. Millwrights previously had received compensation at the collectively-bargained wage rate when working on other West Virginia lock-and-dam projects awarded by the contracting agency.

The Division's errors and omissions in this case are regrettable, as it appears that there was a strong possibility that the wage determination might have been modified and the Local's \$26.13/hr. millwright wage rate adopted if a timely request for review had been filed. However, it is well established that parties who have an interest in projects subject to Davis-Bacon Act wage protections are obligated to familiarize themselves with the particulars of wage determinations and "to challenge the accuracy and completeness of a wage determination at the beginning of the solicitation and procurement process." *Clark Mechanical Contractors, Inc.*, WAB Case No. 95-03, slip op. at 5.^{6/} The timeliness requirement for seeking review of a wage determination is essential to the efficient operation of the procurement process.

We therefore reject the Local's argument that the Division's errors and omissions require the unprecedented action of reversing the conformance and instead instituting a retroactive modification of the wage determination. The potential result of failing to file a timely request for review and reconsideration of a wage determination – *i.e.*, that a different (and lower) millwright wage rate might be added through the conformance process – serves to underscore the fact that interested parties, including contractors and affected "laborers and mechanics" and their representatives, bear significant responsibility for monitoring wage determinations that may be incorporated into bid solicitations.

C. Whether the Administrator engaged in appropriate reconsideration of the conformance determination

Although the decision letter denying the modifications requested by the Local discussed the "retroactive modification of a wage determination" issue at length, the Administrator accorded the Part 5 conformance issue abbreviated treatment, essentially within the space of two paragraphs. AR Tab A at 1-2. Any analysis arguably associated with this "reconsideration" is, in our view, inadequate if not nonexistent. Findings reached by means of analysis and a final determination of the issue are lacking as well.

^{6/} Although we affirm the Administrator's action on this count without regard to whether the Local had actual knowledge that the millwright wage rate was missing from the wage determination, we note that business representatives for a district council of carpenters and affiliated locals (including Millwright Local Union 1755) attended pre-bid and pre-job meetings, as did the business manager of Millwright Local Union 1755. Specifically, a pre-bid meeting of management and labor was convened on December 9, 1993, for purposes of discussing the Heavy and Highway Construction Project Agreement and of "negotiat[ing] an addendum specific to the Winfield project." The addendum covered wage rates and working conditions at the project. A pre-job meeting was convened on August 9, 1994, for purposes of signing the project agreement. According to Al Johnson, the issue of the millwright classification and wage rate was not raised at either meeting. See AR Tab P at 2-3 and attachments 4-7.

The decision letter charted the following course on the conformance question: The Administrator first acknowledged the applicable regulatory criteria, namely that an unlisted classification may be conformed when (i) the work to be performed by the classification is not performed by a classification already listed in the wage determination, (ii) the classification is utilized in the area by the construction industry and (iii) the proposed wage rate bears a reasonable relationship to wage rates already included in the wage determination. 29 C.F.R. §5.5(a)(1)(v)(A). The Administrator next articulated a policy adopted by the Division in implementing the final criterion:

In recent years . . . it has been the policy of the Wage and Hour Division in evaluating whether a proposed rate for an additional classification bears a reasonable relationship with the rates in a contract wage determination, to require that the proposed rate for a skilled classification be equal to or exceed the lowest rate of the skilled classifications that have rates higher than that of the unskilled laborer. (*See Clark Mechanical Contractors, Inc., Wage Appeals Board (WAB) Case No. 95-03, copy enclosed*).

AR Tab A at 2. The Administrator then concluded merely by reporting the Division's early action: "Thus, on January 9, 1997, the Wage and Hour Division approved the addition of a millwright classification at an hourly rate of \$18.51 plus \$5.60 fringe benefits (totaling \$24.11) for the heavy construction portion of this contract." *Id.*

The foregoing represents the extent of the consideration accorded the Division's conformance and the Local's request for its review. The Administrator wholly failed to address issues implicit in the Local's petition – namely whether collectively-bargained wage rates dictate a conformance result, and if not, whether or to what extent bargained rates otherwise should bear on conformance determinations. The Administrator additionally neglected to discuss any of the materials evincing disagreement among the parties. Nowhere did the letter find the conformance to be appropriate (or inappropriate) agency action. Nor did the letter explicitly affirm, modify or reverse the January 9, 1997 conformance action; instead, the Administrator merely reported that the action had occurred, with no suggestion that the Administrator had reached a final agency decision on this question.

In addition to the paucity of analysis and findings advanced in the decision letter, we consider significant that the Administrator denied the Local's requested modifications pursuant only to 29 C.F.R. §1.8, which governs reconsideration of *wage determinations*. AR Tab A at 4 ("[y]ou may consider this letter to be a final determination in accordance with 29 C.F.R. 1.8, which may be appealed pursuant to 29 C.F.R. 1.9 and Part 7, Subpart B"). There is no suggestion that the Administrator's decision was intended to resolve the Local's Part 5 *conformance* inquiry. We conclude because of this exclusionary pronouncement that the Administrator rendered a final decision pertaining solely to the former issue of whether the wage determination should be modified retroactively.

In the absence of a stated disposition, we deem the issue of conformance undecided. Until the Administrator has issued a final decision as to the propriety of the Division's conformance, we

lack jurisdiction to decide this aspect of the Local's petition for review of the Administrator's decision letter. Notably, under 29 C.F.R. §7.1(b), the Board is constrained to assume jurisdiction over "appeals concerning questions of law and fact from *final* decisions under sections 1, 3 and 5 of this subtitle" (Emphasis added.) Accordingly, we must remand this case to the Administrator for a final decision on the Local's request for reconsideration of the conformed wage rate.

D. The role of employees and unions in the Davis-Bacon conformance process, and whether the Administrator must give deference to collectively-bargained wage rates

Although not essential to the disposition of this case in light of our decision to remand the Local's conformance challenge to the Administrator for a final determination, we nonetheless take this opportunity to provide guidance on two important questions of law that were fully briefed and argued by the parties: the role of employees and unions in the conformance process, and whether the collectively-bargained wage rates are significant when establishing conformed classifications and associated wage rates.

In the conformance protest portion of this case, the Unions asserted as part of their argument to this Board that when considering a conformance request, a contracting agency and the Wage and Hour Division must ascertain whether the contractor is subject to a collective bargaining agreement and, if so, the Division "must give great weight and deference to the wage which the contractor is arguably bound by the collective bargaining agreement to pay." [Petitioner and Intervenor] Memorandum in Reply to the Statement of the Acting Administrator in Opposition to the Petition at 14. In contrast, the Administrator generally dismissed the relevance of the collectively-bargained rates in the conformance process, declaring that:

[i]n setting rates through the conformance procedure, Wage and Hour is not required to use either the prevailing wage rate in the locale or the union negotiated rate. As the Wage Appeals Board pointed out in *M.Z. Contractors Co., Inc.*, Slip op. at 3, WAB Case No. 92-16, (August 16, 1993), the [Davis-Bacon] regulations "do not require a conformed rate to be either the collectively bargained rate or the 'prevailing rate.'"

Statement of the Acting Administrator in Opposition to the Petition at 14. As the Unions correctly note, the issue that is joined by these opposing arguments is the correct interpretation the conformance regulations found at 29 C.F.R. §5.5(a)(1)(v)(B) and (C).

As a reviewing body, our standard for evaluating the Administrator's interpretation of the Davis-Bacon regulations is highly deferential. *See U.S. Dep't of State*, ARB Case No. 98-114, Feb. 16, 2000 (upholding Administrator's interpretation of Service Contract Act regulation). The Supreme Court has noted that when reviewing an agency's application of a regulation, an adjudicator:

must give substantial deference to an agency's interpretation of its own regulations. . . . Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." . . . In other words, we must defer to the Secretary's interpretation unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation."

Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994) (citations omitted); *accord Paralyzed Veterans of America, v. D.C. Arena L.P.*, 117 F.3d 579, 584-585 (D.C. Cir. 1997). Thus, when evaluating the Administrator's interpretation of the conformance regulation and its relationship to collectively-bargained wage rates, we consider whether the interpretation is consistent with the language and intent of the statute and the regulations, with particular regard for the Administrator's express views at the time the regulations were promulgated.

Regrettably, neither the parties nor the intervenor directed the Board's attention to interpretive sources that might illuminate the intent of the regulations, and the Administrator's brief to the Board offers no useful analysis of the regulatory text. However, our own research unearthed materials relevant to this issue.

It appears the first effort to codify a Davis-Bacon conformance procedure was proposed by the Department in November 1962. In a proposed rulemaking, the following language was offered, to be codified as part of the Davis-Bacon wage determination regulations (Part 1) as 29 C.F.R. §1.15:

1.15 Additional classifications under the Davis-Bacon Act.

Whenever a wage determination contained in a contract subject to the Davis-Bacon Act does not contain a minimum wage for a classification of laborers or mechanics which is needed in the performance of the contract, the contracting officer, upon his own initiative or that of the contractor or subcontractor seeking to employ the class of laborers or mechanics in question, and after consultation with such contractor or subcontractor, shall propose a prevailing wage for such an additional classification of laborers or mechanics under the standards of the Davis-Bacon Act and this part. The proposed prevailing wage of the contracting officer shall be subject to prompt review by the head of the Federal agency or his authorized representative. Within ten (10) days following such review, the proposed prevailing wage, including any revision thereof by the head of the agency or his authorized representative, shall be transmitted to the Solicitor for consideration and review. The Solicitor shall be deemed to adopt the proposal as his determination, unless within thirty (30) days from his receipt of the proposal the Solicitor finds that it is not in accordance with the standards of the Davis-Bacon Act

and this part; in which event he shall determine the prevailing wage for the classification in question as of the time the contract was awarded.

Proposed Rulemaking, 27 Fed. Reg. 10761, 62 (Nov. 3, 1962). This original proposal contemplated that the contracting officer and the contractor (or subcontractor) would have primary responsibility for determining conformed classifications and wage rates, with a subsequent expedited review by the Labor Department's Solicitor.

The conformance regulation that was published in final form in 1964 provided a slightly different scheme, codified within the Part 5 regulations:

5.5 Contract provisions and related matters.

* * *

(a)(1)(ii) The contracting officer shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract, shall be classified or reclassified conformably to the wage determination and a report of the action taken shall be sent by the Federal agency to the Secretary of Labor. In the event the *interested parties* cannot agree on the proper classification or reclassification of a particular class of laborers and mechanics to be used, the question accompanied by the recommendation of the contracting officer shall be referred to the Secretary for final determination.

27 Fed. Reg. 95, 100 (Jan 4, 1964)(emphasis added). Under the 1964 conformance regulation, if all the “interested parties” agreed to the additional classification and wage rate, the rule contemplated little oversight by the Labor Department (“a report of the action taken shall be sent”); the Labor Department would become involved only in situations in which there was no agreement. This final rulemaking offered no explanation why the 1962 proposed formulation was modified; furthermore, the term “interested parties” was not defined anywhere in the Part 5 regulations. Thus, it is unclear whether the regulation was intended to include participation by employees or their representatives

in the conformance decision,^{7/} although later revisions to the regulations (*see* discussion below) suggest that employees generally were shut-out of the process under the 1964 regulatory scheme.

The 1964 version of the conformance regulation survived with only minor changes until January 1981, when the Carter administration completed a comprehensive overhaul of the Davis-Bacon regulations. The 1981 revision changed the structure of the conformance regulation – basically splitting the 1964 regulation in two, divided between the “interested parties agree” versus “interested parties disagree” scenarios – but the general scheme for conformance was left intact:

5.5 Contract provisions and related matters.

* * *

(a)(1)(ii)(B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, agree with the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator . . . [.] The Administrator . . . will approve, reverse, or modify every additional classification action.

(C) In the event the contractor, or the laborers or mechanics to be employed in the classification or their representatives, do not agree with the contracting officer on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. . .

^{7/} The other sections of the Code relating to the Davis-Bacon Act that were issued in 1964 also provide no clear guidance on this score. For example, the Part 1 regulations (which were published simultaneously with the Part 5 conformance procedure) indicate that when compiling prevailing wage schedules, the Department gathers wage data from “contractors, contractors’ associations, *labor organizations*, public officials, and *other interested parties*.” *See* 29 C.F.R. §1.3(a)(1966)(emphasis added). This language suggests that the Department in 1964 may have viewed the term “interested party” as including labor unions. On the other hand, the Part 7 regulations (“Practice Before Wage Appeals Board”) that were published in final form only a few months later in June 1964 provide that wage determinations could be appealed by “interested persons” (explicitly defined to include labor unions), while conformance decisions could be appealed by “interested persons or parties.” *Compare* 29 C.F.R. §§7.2(b) and 7.10(c)(1966). This latter formulation may suggest that the term “interested party” (found in the conformance regulation) was not co-extensive with the term “interested persons” (defined in 29 C.F.R. §7.2(b)), and thus might not have contemplated union input into the *initial* conformance process under §5.5 (involving “interested parties”), even while giving unions the right to appeal the ultimate conformance decision.

46 Fed. Reg. 4380, 88 (Jan. 16, 1981). The explanatory material accompanying the final 1981 regulation offered the following language describing how the revised procedure would operate:

A substantial number of comments were received concerning the provisions of §5.5(a)(1)(ii), which deals with the issue of adding necessary classifications and rates omitted from the wage determination which has been made applicable to the project in question. Concern was expressed that the procedures in this subsection would impose collective bargaining, cause delays, create the potential for disruption and disagreement, and slow the construction process.

The changes proposed and finalized in this subsection will not impose collective bargaining. The Department of Labor will continue its long-standing policy of prohibiting the artificial splitting of classifications traditionally recognized in the construction industry and traditionally contained in Department of Labor wage determinations. The inclusion of employees, or their representatives, as interested parties in the process of adding classifications and rates which have been omitted from wage determinations recognizes the facts of economic reality, that workers bring a useful intelligence of the relationship of the work they are performing to that of other classes which helps set proper rate relationships. To deprive them of a right to have input in this process, as was the case in the past, would be to continue an unjustifiable inequity. This was recognized when the policy dealing with the same issue in cases arising under the Service Contract Act was adopted in 1966.

46 Fed. Reg. 4380, 82 (emphasis added).

Although the January 1981 Davis-Bacon regulations were suspended pursuant to a presidential directive (46 Fed. Reg. 11253, Feb. 6, 1981), and different final regulations later were published with many substantive changes that affected other aspects of Davis-Bacon Act administration and enforcement (47 Fed. Reg. 23658, May 28, 1982), the current version of the conformance mechanism found at 29 C.F.R. §5.5(a)(1)(v)(1999) is not significantly changed from the January 1981 regulation described above.

Several principles can be gleaned from this history. First, the conformance regulation plainly requires that contracting agencies and the Administrator actively solicit input not only from the contractors, but also from affected employees and their representatives, when considering a conformance request on a project subject to Davis-Bacon protections:

- The 1962 proposed version of the conformance regulation merely required a contracting officer to engage in “consultation with . . . [the] contractor or subcontractor” before proposing a conformed wage rate to the head of the contracting agency, and then to the

Labor Department for review. The proposed regulation did not require any *agreement* by the contractor or subcontractor.

- The 1964 final version of the conformance regulation placed an emphasis on *agreement* between the contracting officer and the other “interested parties” (apparently limited to the contractor and/or subcontractor). If the “interested parties” agreed on the conformance action, the contracting officer merely was required to “report” the action to the Labor Department. If the “interested parties” could not agree, the contracting officer would refer the matter to the Labor Department with a recommendation.
- The 1981 conformance regulation, which is the basis for the current regulation, was amended to require employee input because “[t]he inclusion of employees, or their representatives, as interested parties in the process of adding classifications and rates which have been omitted from wage determinations recognizes the facts of economic reality, that workers bring a useful intelligence of the relationship of the work they are performing to that of other classes which helps set proper rate relationships.” If the contracting officer, employers and employees do not agree, the contracting officer must transmit the views of *all* the parties to the Administrator for consideration. At the same time, the preamble that accompanied the revised 1981 conformance regulation explicitly states that the process is not designed to “impose” collectively-bargained wage rates.

Thus the Unions are correct in their assertion that contracting agencies must determine whether workers on a Davis-Bacon project are represented by a labor union when confronted by a conformance request, and must affirmatively solicit the views of the union. At sites where workers are not represented, the contracting agency similarly must attempt to obtain the views of the employees regarding the proposed additional classification and rate. After all, §5.5(a)(1)(v)(B) opens with the words, “If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer *agree on the classification and wage rate . . .*” How can there be a determination whether there is agreement without first making some kind of investigation and inquiry? To require anything less would render the language of the regulation a nullity.

Although the Administrator is correct in stating that he is not automatically required to adopt a classification and wage rate found in a collective bargaining agreement in situations where a conformance action otherwise is appropriate (*i.e.*, the work to be performed by the requested classification is not performed by a classification in the wage determination; the classification is utilized in the area by the construction industry; and the proposed wage/fringe benefit rate bears a reasonable relationship to the wage rates in the determination), neither is the Administrator (and the contracting officer) free to ignore such negotiated classifications and wage rates. A collective bargaining *agreement* between a contractor on a Davis-Bacon project and a labor organization representing its employees is strong evidence of exactly the kind of *agreement* among the parties concerning classifications and wage rates that the conformance regulation itself encourages. 29 C.F.R. §5.5(a)(1)(v)(B). Moreover, absent unusual circumstances, a collectively-bargained wage rate is an important indicator of the value that the local labor market has placed on the particular skills of the job classification being conformed. For these reasons, a collective bargaining agreement

between the contractor and its employees should be given significant weight in the Administrator's review of a conformance request. Although the Administrator is correct that the regulations do not *require* a conformed wage rate to be the collectively-bargained rate, it does not follow that the Administrator is free to ignore classifications and wage rates that a contractor has negotiated with its employees, either. The regulation plainly directs otherwise. The Administrator's cursory dismissal of an employer's agreement to collectively-bargained classifications and rates in the context of a conformance action clearly cannot be squared with the text of the regulation and its intent.

CONCLUSION

Although the Division's errors when initially developing the "heavy" wage determination used on the lock-and-dam project were serious and cannot be condoned, the regulations plainly prohibit modifying a wage determination after a contract has gone to bid. Accordingly, the Local's petition seeking retroactive modification of the wage determination is **DENIED**.

Even though the Administrator invited the Local to request reconsideration of the \$24.11/hr. conformed wage rate for millwrights, the Administrator's final decision letter of December 23, 1997, does not address the relevant data and otherwise is unresponsive to the Local's request. Because there is no final decision of the Administrator on the conformance issue, we lack jurisdiction to decide the question. Accordingly, the conformance issue is **REMANDED** to the Administrator for action consistent with this Decision.

We note that this case has been pending at various levels of the Labor Department for some time, and both the Administrator (and this Board) should take all necessary steps to bring this dispute to an expeditious conclusion. The Administrator is **ORDERED** to issue a final and appealable decision on the conformance question within 60 days of the date of this Decision, grounding his findings on the evidence in the record and articulating clearly the determination reached and the reasons for his choice.

Finally, in the interest of clarity, we specifically note that this Board does not suggest any particular outcome in issuing this remand order. All that is required is that the Administrator engage

in reasoned decision-making based on the record before him, taking into account the positions of the interested parties and any evidence of agreements between Al Johnson and its employees with regard to classifications and wage rates.^{8/}

SO ORDERED.

PAUL GREENBERG

Chair

CYNTHIA L. ATTWOOD

Member

^{8/} Board Member E. Cooper Brown did not participate in the consideration of this case.